BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Christiane Bryan dated May 18, 1993, alleging sexual harassment and reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Christiane Bryan

Complainant

- and -

Premark Canada Inc., Gary Colegate and Paul Stethem

Respondents

DECISION ON COSTS

Adjudicator : Heather M. MacNaughton

Date : May 31, 1999

Board File No: BI-0096-96

Decision No : 99-005-C

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	William R. Holder, Counsel
Christiane Bryan, Complainant	)	On her own behalf
Gary Colegate, Respondent	)	Angela Rae, Counsel

The Respondent, Gary Colegate, seeks costs from the Ontario Human Rights Commission (the "Commission") after the complaints against him of harassment and reprisal were dismissed in a decision dated November 6, 1998.

The Board's jurisdiction to award costs is contained in Section 41(4) of the Ontario *Human Rights Code* R.S.O. 1990, c. H. 19 as amended (the "*Code*") as follows:

> "Where, upon dismissing a complaint, the Board of Inquiry finds that,
>
> (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
>
> (b) in the particular circumstances undue hardship was caused to the person complained against,
>
> the Board of Inquiry may order the Commission to pay to the person complained against such costs as are fixed by the Board.

Based on the restrictive wording of section 41(4), costs can only be awarded against the Commission, and only in favour of respondents to a complaint. The section 41(4) preconditions to an award of costs, make an award available only if: a) the complaint is dismissed, b) the Board finds that the complaint was trivial, frivolous, vexatious, made in bad faith, or c) undue hardship was caused to the respondent.

Even if the preconditions in section 41(4) are met, an award of costs is still discretionary, clearly indicating the Legislature's intent that costs are to be awarded only in rare circumstances. This is quite unlike the civil justice system in which costs awards commonly follow the event.

The Board has consistently held that the discretion to award costs should be exercised sparingly in order to avoid the "chilling" effect that an expansive interpretation of section 41(4) would create. This has not been expressed as a concern about the financial impact such awards may have on the Commission. Rather, the Board has held that its discretion to award costs should not be exercised

in a way that would discourage the Commission from bringing important and novel human rights disputes to the Board, where costs might be ordered against it. This is of particular concern in a statutory scheme that has resulted in such a small percentage of human rights disputes reaching the adjudicative stage.

Nonetheless, this concern must be balanced against the hardship and cost, monetary and otherwise, to a respondent who has been a party to a human rights hearing in circumstances where the complaint is dismissed. I note that, except where the complaint itself is found to have been trivial, vexatious or made in bad faith, the wording of section 41(4) contemplates that the successful respondent is expected to bear some "hardship" without compensation, and can only recover costs when that hardship can be shown to be "undue". It is clearly not the case, nor is it the legislative intention, that in each circumstance where the Commission is unsuccessful, a costs order should be made against it.

Jurisdictional Objection

The Commission submits that I have no jurisdiction to award costs in this case because the complaint was not dismissed in its entirety. Ms Bryan's complaints against the respondents Stethem and Premark Canada Inc. were upheld. In support of this position counsel for the Commission relies on the decision of this Board in *Naraine v. Ford Motor Co. Of Canada (No. 6)* (1997) 28 C.H.R.R. D/275. *Naraine* is distinguishable from the case before me. In *Naraine*, some of the complaints against the respondent Ford were dismissed, and some were upheld, leading Professor Backhouse to decide that:

> "The phrase "upon dismissing a complaint" might be construed to mean "the entire complaint" or "a portion of a complaint." ....in keeping with the tenor of the rest of the subsection, it seems proper to conclude that the entirety of the complaint (or complaints in cases where multiple complaints are filed) must be dismissed before an award of costs is permissible."

In the case before me, Ms Bryan's complaints against Mr. Colegate were dismissed in their entirety. In such a circumstance, to disallow Mr. Colegate's claim for costs would lead to the most unfair

result that the Commission could proceed in bad faith, or on a trivial, frivolous or vexatious basis against several respondents and, so long as liability was found against one of the respondents, the remaining respondent would have no recourse to section 41(1). In my view, the *Naraine* decision cannot be interpreted that broadly. I find that I have jurisdiction to order costs against the Commission, as a result of the dismissal of the entire complaint against Mr. Colegate.

The grounds for seeking a costs award in this case are that the complaint against Mr. Colegate was made in bad faith, and that the circumstances of this case caused him undue hardship. Counsel for Mr. Colegate, in her written submissions, made no specific submissions that the complaint was trivial, frivolous or vexatious. Having reviewed the extensive caselaw which interprets the meaning of "trivial, frivolous or vexatious" in the context of a costs award under the *Code*, I adopt the definitions accorded these words in *Potocnik v. Thunder Bay (City) (No.4)*(1997), 29 C.H.R.R. D/343 as follows:

> "Thus, for the complaint to be trivial or frivolous, the issues must be unimportant, petty, silly, or insignificant enough to be a waste of the tribunal's time. In addition, a complaint completely without factual or legal basis might be considered trivial or frivolous. A vexatious complaint is one that aims to harass, annoy or drain the resources of the person complained against. A complaint made in bad faith is one pursued for improper reasons – a vexatious complaint is an example of one made in bad faith."

In my view, the allegations in this complaint are not so devoid of evidentiary or factual backing so as to be trivial or frivolous. Because of the conceptual difficulty in determining the distinction between a complaint that is made in bad faith and one that it vexatious, I propose to deal with the analysis on the primary argument of counsel for Colegate, that the complaint was made in bad faith.

The Bad Faith Argument

Counsel for Colegate submits that I should exercise my discretion in favour of a cost award because the complaint was made in bad faith. In support of her submission, she relies on the number of times in the decision on the merits at which I make findings against the credibility of Ms Bryan. A review

of all those findings indicates that I was able to reach those credibility conclusions after having had the opportunity to weigh all of the evidence available to me, delivered under oath, and under the scrutiny of vigorous cross-examination. After so doing I found that, on a balance of probabilities, Colegate's version of the events in question was more credible. I made no finding that the complaint was filed with a "sinister" or "ulterior" motive or for an improper purpose. (*Daniels v. Hamilton-Wentworth Police Services Board* [1997] OHRBID No. 699b and *Wellington v. Brampton (City)* (No.2) (1995), C.H.R.R. NP/96-146. There was no evidence to support such a finding and I conclude that the complaint was not made in bad faith.

In some circumstances, bad faith on the part of the complainant will be sufficient to found a cost award against the Commission, without any further finding of irresponsibility on its part. (*Grace v. 149468 Canada Inc. (No.2) (*1996), 27 C.H.R.R. D/381, followed in *Potocnik v. Thunder Bay (City) supra*. This is, in my view, unlikely to be the result when an adjudicator is faced with the difficult task of making extensive findings of credibility after hearing all of the evidence in a case.

When a determination of credibility is required, based on the adjudicators opportunity to observe and assess answers in examination in chief and in cross-examination for their internal and external consistency, it is hard to conceive of it ever being appropriate to make a cost order against the Commission. These cases are most often decided on a balance of probabilities, with one witnesses version of events being preferred over that of another. The task of the Commission is not to reach conclusions about credibility during the investigation stage. In my view the Board is best qualified to make that assessment on the basis of evidence of all of the witnesses given under oath and subjected to the scrutiny of cross-examination.

Counsel for Colegate further submits that the conduct of the Commission staff, prior to the referral of the complaint to the Board, should be considered when determining whether or not to exercise my discretion in favour of a cost order. A thorough investigation, she submits, would have revealed the bad faith of Ms Bryan or highlighted her lack of credibility earlier in the process.

Having concluded that Ms Bryan's complaint was not made in bad faith, the Commission investigation process is arguably not relevant. It may, however, be relevant to the undue hardship argument which follows.

The Commission investigation was the subject of extensive submissions to Mary Woo Sims, the former adjudicator assigned to this matter, in support of an unsuccessful motion by the Respondents to have this complaint dismissed or permanently stayed. As a result of Ms Sims' decision not to dismiss or stay this complaint, the Commission argued that I was estopped from again reviewing this conduct for the purposes of this costs submission, on the basis of *res judicata.* I do not find that submission persuasive for two reasons; firstly, Ms Sims made no findings of fact with respect to the Commission conduct of its investigation. She simply found that, regardless of the steps taken during the investigation, there was insufficient prejudice to the Respondents to prevent them from meeting the case against them or for her to conduct the inquiry into whether a right of the complainant had been violated. Hence, Ms Sims did not decide the issue of investigator bias and no estoppel arises. Secondly, the issues raised by counsel for the Respondent in this costs application are not the same issues that were raised in the preliminary motion to dismiss the complaint. The argument in that motion was that a biased investigation led to an incorrect or uninformed decision to refer this complaint to the Board. The argument by counsel for Mr. Colegate in this submission is that a diligent investigation and reasoned analysis by the Commission would have disclosed the bad faith of the complainant. I conclude that even if Ms Sims had been critical of the Commission investigation process, I could still look at those facts for the different purpose suggested here, and rely on them as facts which could persuade me to exercise my discretion in favour of a costs award. These facts could either go to the bad faith analysis or to that of undue hardship.

However, having reviewed the extensive submissions about the Commission process and the evidence filed before Ms Sims in that regard, I conclude that there was little that could have been discovered that would have altered the fundamental assessment of credibility that I was required to make in reaching the conclusions in this case. Perhaps it can always be said of an investigator that there was one more witness they could have interviewed, or one more document that they could have

reviewed, but it is to be remembered that conclusions of fact on a balance of probabilities is the task of this Board. The task of the Commission is to conclude that "it appears...that the procedure is appropriate and the evidence warrants an inquiry..." in accordance with their statutory obligation under section 36(1) of the *Code*. I was satisfied that, while not perfect, the investigation was sufficient for the Commission to conclude that this was an appropriate case to refer to the Board.

The Undue Hardship Argument

Counsel for Colegate further urged me to find that the conduct of Commission counsel during the course of the hearing caused unnecessary delay and wasted hearing time causing undue hardship to Colegate. A respondent to a human rights complaint is put to hardship and expense, legal and otherwise, in defending their actions or inactions. Some such hardship is a necessary component of a statutory scheme which pits litigants against each other in an adversary setting. Only hardship which is undue is compensable. A review of the scheduled hearing dates and the time that was used to present this case on the merits does not reveal evidence of undue hardship. Further, there was nothing in the conduct of this case by Commission counsel which would move this case from the hardship all respondents face, to the level of undue hardship which could be the basis for a costs award on this ground in section 41(4).

Conclusion

No cost order against the Commission is appropriate.

Dated at Toronto this 31st day of May 1999:

H MacNaughton

Heather MacNaughton
Chair, Board of Inquiry